Supreme Court, U.S.
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No. 85-318

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

v.

LARRY P. ELLIOTT, M.D.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

This case concerns a Bill of Costs awarded to Respondent Elliott as the prevailing party in a defamation suit brought by Shahawy. The question presented is:

1. Whether the Per Curiam Affirmance of the Eleventh Circuit erroneously decided the issue before it of whether the United States District Court Middle District of Florida abused its discretion in affirming the Clerk's taxation of a Bill of Costs against Shahawy.

CERTIFICATE OF INTERESTED PERSONS AND PARTIES

TRIAL JUDGE:	WILLIAM J. CASTAGNA
ELEVENTH CIRCUIT PANEL	GODBOLD, KRAVITCH and HATCHETT
PARTIES:	MAHFOUZ EL SHAHAWY, M.D. LARRY P. ELLIOTT, M.D.
COUNSEL:	G. Hunter Gibbons (counsel of record) Claire L. Hamner DICKINSON, O'RIORDEN, GIBBONS, QUALE, SHIELDS & CARLTON, P.A. P.O. Box 3979 Sarasota, Florida 33578 MAHFOUZ EL SHAHAWY, M.D., pro se 1851 Arlington St. Sarasota, FL 33579

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BRIEF OF RESPONDENT ELLIOTT IN OPPOSITION

OPINIONS BELOW

The decision of the Eleventh Circuit in Case No. 84-3618 which Shahawy seeks review of is an unpublished per curiam affirmance without opinion entered April 18, 1985, in Case No. 84-3618, Non-Argument Calendar, D.C. Docket No. 81-545. Rehearing was denied May 21, 1985 and the unpublished order denying rehearing was filed in the Eleventh Circuit on May 21, 1985. Mandate was issued May 31, 1985 (Res. App. 1-2).

The appeal was taken from an order of Judge Castagna's affirming the Clerk's award of a Bill of Costs in the amount of $6,062.85. (Res. App. 3).

The decision of the Eleventh Circuit in Case No. 83-3154 which Shahawy seeks review of is an unpublished per curiam affirmance without opinion entered March 20, 1984, mandate issued May 31, 1984. (Res. App. 5). That appeal was taken

from an unpublished opinion in favor of the Defendant Elliott (Res. App. 6) and a final judgment entered December 22, 1982.

JURISDICTION

The Eleventh Circuit Court of Appeals in Case No. 84-3618 entered its order on April 18, 1985. Rehearing was denied May 21, 1985. The mandate was issued May 31, 1985. (Res. App.1-2). Petitioner Shahawy asserts jurisdiction in this court is derived from 28 U.S.C. 1254 (1).

In Case No. 83-3154, the decision by the Eleventh Circuit was entered March 20, 1984; mandate was issued May 31, 1984. (Res. App. 5). No request for an extension of time to file a petition for writ of certiorari from this decision was requested and none was given.

STATEMENT

The genesis of the appeal before the Eleventh Circuit which forms the basis of Shahawy's petition to this Court lies in the Complaint filed by Shahawy against Elliott on June 12, 1981. (R2. pp. 1-8)[1] Following a non-jury trial, the middle district court of Florida wrote an opinion finding in favor of the Defendant Elliott. (*See, Shahawy v. Elliott,* 81-545-Civ.-T-WC, M'film No. 83, document 5816; R2. pp. 535-548; Res. App. 6).

Final judgment in favor of Elliott was entered on December 22, 1982. Following an appeal, the Eleventh Circuit entered a per curiam affirmance without opinion. (R1. 73. Res. App. 5).

Elliott filed a Bill of Costs with the middle district court seeking costs as the prevailing party. (R1. 89; Res. App. 4).

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1 References to R1. are to the Record on Appeal in Case No. 84-3618, which was returned to the United States District Court for the Middle District of Florida on May 31, 1985. References to R2. are to the Record of Appeal in Case No. 83-3154, returned to the United States District Court for the Middle District of Florida in 1984.

On June 12, 1984, Hon. William J. Castagna, the district judge, entered an order denying the Plaintiff's motion to strike the Bill of Costs. (R1. 721; Res. App. 3). In this order, Judge Castagna stated he had reviewed the costs as taxed by the clerk and found them appropriate (R1. 72; Res. App. 3).

In August of 1984, Judge Castagna entered an order in which he denied Shahawy's motion for relief from the clerk's taxation of costs and denied his motion to review the clerk's taxation of costs. (R1. 93). Plaintiff's request that the court stay any further ruling in this matter until other litigation involving Shahawy was resolved was also denied. (R1 94).

Shahawy filed a notice of appeal to the Eleventh Circuit from that order. (R1. 956). The order was affirmed without opinion and the mandate issued May 31, 1985. (Res. App. 1).

The costs which were awarded to Elliott include the following:

$8.00 paid in fees to the clerk (R1. 8; Res. App. 4);

$168.12 paid for the service of subpoenas. (R1. 8-9; Res. App. 4);

$672.00 for fees of the court reporter for use in obtaining transcripts necessary for use in the case (R1. 8-9; Res. App. 4);

$300.51 in fees and disbursements for printing (R1. 8-9; Res. App. 4);

$1,286.01 in fees for witnesses (R1. 8-10; Res. App. 4);

$1,045.89 for fees for copies of papers necessarily obtained for use in the case (R1. 8, 10; Res. App. 4);

$2,582.32 for costs incidental to the taking of depositions. (R1. 8, 10-11; Res. App. 4);

The total amount of costs awarded Elliott was $6,062.85. (R1. 8; Res. App. 4).

SUMMARY OF ARGUMENT

The petition for writ of certiorari from Case No. 83-3154 is filed from a judgment finalized in May of 1984. The petition

is untimely and should be denied.

Shahawy's petition from Case No. 84-3618 requests this Court to exercise its discretionary review to re-examine an award of a Bill of Costs for $6,062.85 to Elliott, the prevailing party in the underlying defamation case. Review by this Court of the Bill of Costs is unwarranted and does not meet any of the enumerated criteria under Rule 17, Rules of the Supreme Court of the United States. No question of great public importance is raised; no glaring inconsistency or conflict between the federal circuits is established and no unsettled issue of great public importance is raised; no glaring inconsistency or conflict between the federal circuits is established and no unsettled issue of great importance is presented by Shahawy's petition from a Bill of Costs. Further, the decision below was in conformity with established statutory and case law. The Eleventh Circuit did not deem the appeal worthy of either oral argument or a written opinion. (Res. App. 1).

ARGUMENT

REASONS FOR DENYING WRIT

A. The Petition Seeks Review Of A Judgment In Case No. 83-3154 Which Was Final On May 31, 1984; As Such The Petition Is Untimely.

Shahawy attempts to relitigate issues of fact settled against him in the underlying defamation suit, Case No. 83-3154. The decision against Shahawy and in favor of Defendant Elliott became final with the per curiam affirmance, denial of rehearing and the issuance of the mandate in Case No. 83-3154, in the Eleventh Circuit. (Res. App. 5). The mandate in Case No. 83-3154 was issued May 31, 1984. (Res. App. 5). As such the issues relative to that case cannot be reviewed via Shahawy's petition for writ of certiorari filed August 16, 1985, because the time has run to review the 1984 decision. *See*, 28 U.S.C. §1201. *C.f.*, *Parker v. Texas*, 267 U.S. 604 (1925) (memorandum decision) holding petition dismissed as untime-

ly; and *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950) observing certiorari may be denied where untimely filed.

Shahawy's petition for a writ of certiorari to review Case No. 83-3145 should be denied as his petition was filed one year and two and one-half months after the decision he seeks review of.

B. Shahawy's Brief Does Not Conform To Rules 21. 5 and 34.6.

Any possible review of this Court is limited solely to the Bill of Costs. The questions and allegations addressed to alleged perjured testimony during the defamation trial, whether Elliott's statement had a qualified privilege (issues pertaining to the defamation trial), and whether Elliott participated in an antitrust conspiracy (a new issue not raised below) (Questions II-VI, Re: Dr. Shahawy's petition, p. 0) are patently beyond the scope of his petition. Rule 21.5, Rules of the Supreme Court of the United States, alone provides reasons why this Court should deny the petition as the petitioner has failed to present with accuracy, brevity, and clearness whatever is essential to his petition for a writ of certiorari to review a Bill of Costs judgment.

As the merits of the underlying defamation case are not properly before this Court, there is no need to elaborate upon the inadequate portrayal of the facts in Shahawy's Statement. One example should suffice. Shahawy maintains Dr. Chinoy presented "perjured" testimony. Yet the trial judge specifically found Dr. Chinoy "a highly credible witness." (Res. App. 6E). The facts of the underlying defamation case are presented in the trial court's written opinion (Res. App. 6) and the Eleventh Circuit's affirmance establishes there was record support for these findings of fact. Shahawy's version of the facts, containing unsupported accusations of perjury by witnesses and an attorney of record, brings Shahawy perilously close to violation of Rule 34.6, Rules of the

Supreme Court of the United States. This rule prohibits burdensome, immaterial and scandalous matter. Further, Shahawy's omission of certain facts and mischaracterization of others constitutes reason for denying certiorari. *Conway v. California Adult Authority,* 396 U.S. 107 (1969); c.f., *Davis v. Jacobs,* 454 U.S. 911 (1981).

C.The Petition Seeks Review Of Factual Determinations Particular To This Case Alone.

The only real issues raised by an appeal from a Bill of Costs are whether the applicable statute 28 U.S.C. §1920 was complied with and factual questions addressed to whether the items were reasonable and necessary.

A brief review of the items discussed in Elliott's Statement, items found in the appellate record of Case No. 84-3618 at 4-72, 93-94; (documentation for the costs is at pp. 4-71) and in Respondent's Appendix at page 5 illustrate these items are recoverable under the clear language of 28 U.S.C. §1920. As 28 U.S.C. §1920 is specific and the case law well settled, there is no discernible reason for this Court to grant certiorari to review a settled area of law.

Any factual questions concerning the Bill of Costs are factual questions particular to this case alone. *See, Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 640 (6th Cir. 1979) holding the test for a correct award of costs is whether the trial court deemed the items "reasonable and necessary." This is a factual question. *United States v. Kolesar,* 313 F.2d 835, 839 (5th Cir. 1963).

Such narrow factual questions are of little interest to anyone except the parties to this suit. In essence, Shahawy asks this Court to make a third review of the appellate record and documentation relative to the awarded costs to see if this Court can discover some error the Eleventh Circuit and the United States District Court Middle District of Florida were unable to discover. This Court has held: "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). It is without dispute that factual determinations by the trial court in an appeal from a Bill of Costs are awarded great deference. *E.g., United States v. Kolesar, supra*, 313 F.2d at 839. Review by this Court is particularly unnecessary under the criteria mentioned in Rule 17, Rules of the Supreme Court of the United States. *See also, National Labor Relations Board v. Pittsburg S. S. Co.*, 340 U.S. 498, 502 (1951) holding certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal; and *General Talking Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1930) holding the writ will not be granted to review the evidence or inferences drawn from it.

Shahawy also seeks review of an order denying his motion for a new trial based upon newly discovered evidence. A motion for a new trial upon newly discovered evidence raises only questions of fact particular to the parties and having no general public importance. Under the clear dictates of *United States v. Johnston, supra; National Labor Relations Board v. Pittsburg S. S. Co., supra;* and, *General Talking Pictures Corporation v. Western Electric Company, supra*, a writ of certiorari will not be issued to review factual issues or to review evidence.

D. Settled Principles Of Law Support The Court's Judgment.

Shahawy asserts that the Eleventh Circuit "sanctioned an extreme departure from the accepted and usual course of judicial proceedings" because it awarded costs to Elliott which were "over-reimbursement." But the amount of the award is a fact question, the determination of which is particularly within the province of the trial court, *e.g., United States v. Kolesar, supra*, and which presents factual issues

peculiar only to this case and not susceptible to review by this Court. *E.g., General Talking Pictures Corporation v. Western Electric Company, supra.*

Shahawy's second allegation of a grave departure based upon his allegation that Elliott did not personally incur the costs is without serious merit. *See, Dasher v. Mutual Life Insurance Company of New York,* 78 F.R.D. 142, 145 (S.D. Ga. 1978) holding the fact the insurance carrier "picked up the expense tab" did not preclude entry of an award of costs in the prevailing party's behalf. Shahawy argues in effect a conflict between the circuits is created as to this point. He cites no cases directly holding that a prevailing party is prohibited from an award of costs because an insurance company is involved in the case.

As a practical matter, a per curiam affirmance without opinion does not create any conflict between decisions of other circuits because there is no written opinion to generate conflict. *C.f., Jenkins v. State,* 385 So.2d 1356 (Fla. 1980) which, while decided solely on Florida law, illustrates the reasons why the Florida Supreme Court will not exercise its discretion to review a lower appellate court's per curiam affirmance without opinion upon grounds that a conflict exists.

Shahawy asserts the Eleventh Circuit and the Federal District Court erred in denying his motion to stay the Bill of Costs pending the outcome of other litigation in which Shahawy is a party. It was entirely correct for the trial court to refuse to stay the award of costs pending the outcome of other litigation which involves Shahawy. There is no question that Shahawy has several pending lawsuits. But Elliott is not a party to these other suits. Elliott is the "prevailing party" in the defamation case and is entitled to costs under both the Federal Rules of Civil Procedure and the Federal Statutes. Whatever the ultimate outcome of Shahawy's other litigation, Elliott will still be the "prevailing party" in this suit.

However unhappy Shahawy is with the result of his suit

against Elliott, however much Shahawy hopes for satisfaction against other parties in other litigation, Shahawy cannot change the fact that Elliott is the prevailing party in Case No. 83-3154 and is entitled to costs regardless of the other litigation.

There was no error and no viable reason for this Court to grant certiorari.

CONCLUSION

Shahawy has failed to establish any of the valid reasons discussed in case law from this Court or enumerated in Rule 17, Rules of the Supreme Court of the United States, which would justify this Court's attention via a writ of certiorari. Shahawy's petition, reduced to its legitimate scope, seeks review of a single Bill of Costs to the prevailing party in another suit. There being no federal question of great importance, no conflict between the circuits created by a per curiam affirmance without opinion, and no grave departure from established law, the petition for a writ of certiorari should be denied. Respondent Elliott requests that this Court so deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 40 true copies of the foregoing has been furnished to the U.S. Supreme Court, 3 true copies to MAHFOUZ E. SHAHAWY, M.D., 1851 Arlington Street, Suite 206, Sarasota, Florida 33579, Certified Mail, Return Receipt Requested this 16th day of October, 1985.

/S/
G. Hunter Gibbons
Attorney